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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 875

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

vs.

GEORGE T. GOGGIN, Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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GEORGE T. GOGGIN, Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The petitioner, California State Board of Equalization, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 14, 1957.

CITATION TO OPINIONS BELOW

No written opinion was filed by the referee in bankruptcy in the above matter. The order of the bankruptcy court (R. 79) is printed in Appendix B hereto, *infra* page 24. The opinion of the District Court is unreported and is printed in Appendix B hereto, *infra* page 21. The opinion of the Court

of Appeals for the Ninth Circuit (R. 115-121) is printed in Appendix B hereto, *infra* page 12 and is reported at ..... Fed. 2d ..... The conflicting opinion of the Court of Appeals for the Second Circuit in *City of New York v. Jersawit,* 85 Fed. 2d 25 (1936), is printed in Appendix C hereto, *infra* page 26.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 14, 1957 (Appendix B hereto, *infra* page 20). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), and Bankruptcy Act, Section 24(c) (11 U.S.C. Section 47(c)).

QUESTIONS PRESENTED

The Court of Appeals for the Ninth Circuit has affirmed the decision of the Federal District Court upholding the validity of the order of the referee in bankruptcy enjoining the California State Board of Equalization from attempting to collect the California use tax directly from a private person, not a party to the bankruptcy proceeding, when the tax liability arises by virtue of the use by the private party in California of property purchased from a trustee in bankruptcy liquidating the assets of a bankrupt estate (R. 79). The property in question had been sold by the trustee in bankruptcy nine months prior to the time of the order of the bankruptcy court (R. 79). The order also prohibits the California State Board of Equalization from attempting to have the trustee in bankruptcy collect the use tax from the purchaser and transmit it to the State. (A copy of the order of the bankruptcy court is printed in Appendix B hereto, *infra* at page 24).

The following questions are presented by the decision of the Court of Appeals:

1. Did the bankruptcy court have jurisdiction to enjoin the State of California and its agencies from collecting the use tax from the purchaser, a private person not a party to the bankruptcy proceeding, based on the purchaser's use of tangible personal property in California, merely because the property involved had formerly been part of a bankrupt estate which was liquidated by the trustee in bankruptcy?

2. May the trustee in bankruptcy be required to collect the use tax from the purchaser in this transaction and transmit it to the State?

3. Is the Court of Appeals free to disregard the decisions of state appellate courts on matters of substantive law establishing the tax liability to the state of a private person, not a party to the bankruptcy proceeding, and to substitute therefor its own contrary interpretation of the state's statutes?

STATUTES INVOLVED

The statutory provisions involved in this case are sections 1 to 72 of the Bankruptcy Act, (30 Stat. 544, as amended by 52 Stat. 840, 60 Stat. 323 and 66 Stat. 420), [Sections 1 to 112 of Title 11 U.S.C.] the pertinent provisions of which are printed in Appendix "A" hereto *infra* at page 1; Title 28 U.S.C. (Judiciary and Judicial Procedure), Sections 959, 960, 1341 and 2281 which are printed in Appendix "A" *infra* at page 7; and the California Sales and Use Tax Law (California Revenue and Taxation Code, Sections 6001, et seq.) the pertinent provisions of which are printed in Appendix "A" *infra*, at page 9.

STATEMENT OF THE CASE

After the failure of a petition for an arrangement filed on October 29, 1946, Columbia Stamping and Manufacturing

Corporation was adjudged a bankrupt on February 27, 1947, and George T. Goggin was appointed as its trustee in bankruptcy (R. 70). The jurisdiction of the federal district court was invoked because this proceeding arises under the Bankruptcy Act.

The stamping and manufacturing business of the bankrupt was continued by George T. Goggin, the trustee, from the date of bankruptcy to January 5, 1954. On January 5, 1954, the Referee in Bankruptcy orally directed liquidation of the assets of the bankrupt estate. The trustee, on January 5, 1954, sold to the Milton J. Wershow Company, all or substantially all the physical assets of the bankrupt estate including tangible personal property valued in the sum of $10,620.23, all of which property had been used by the trustee in bankruptcy for a seven year period in the operation of the business (R. 71, 101). The use tax thereon under the provisions of California Sales and Use Tax Law (California Revenue and Taxation Code, Sections 6001, et seq.) if applicable amounts to $318.61 (R. 71).

George T. Goggin concededly was a retailer throughout the period in which he operated the business of the bankrupt by virtue of the fact that he made numerous sales of tangible personal property at retail and paid sales tax thereon to the California State Board of Equalization (R. 51, 52, 101).

The items of tangible personal property were not purchased for resale by the Milton J. Wershow Company but were purchased for use by that company and were actually used by that company in this State (R. 71).

No tax based on the sale of the assets to the Milton J. Wershow Company or based on their storage, use or other consumption in this State has been paid to the State of California or the California State Board of Equalization, the duly constituted agency charged with the enforcement of

the California Sales and Use Tax Law, and no sum was collected by the trustee from the Milton J. Wershow Company for any such tax (R. 72).

On or about April 15, 1954, George T. Goggin filed a petition with the Bankruptcy Court for an order enjoining the State of California from asserting any tax or claim against the Milton J. Wershow Company with respect to the property which that Company had purchased on January 5, 1954, and enjoining the State of California from asserting any tax or claim against George T. Goggin, the Trustee in Bankruptcy, because of this transaction (R. 42). On October 22, 1954, the Honorable Hugh L. Dickson, Referee in Bankruptcy, entered an order permanently enjoining the State of California and the State Board of Equalization "from collecting, or attempting to collect from George T. Goggin, either as trustee of the estate of Columbia Stamping and Manufacturing Corporation, Bankrupt, or individually, or from Milton J. Wershow Company * * * any tax or debt of whatsoever nature arising from, or based upon any of the provisions of the Sales and Use Tax Law of the State of California" with respect to the property purchased by the Milton J. Wershow Company on January 5, 1954, which is referred to above (R. 79). The California State Board of Equalization petitioned for a review of this order. On June 20, 1955, the petition for review was denied by the Honorable Ben Harrison, one of the judges of the United States District Court for the Southern District of California, Central Division, and the order of the referee in bankruptcy was confirmed, ratified and approved (R. 100, Appendix B *infra*, page 22).

An appeal to the Court of Appeals for the Ninth Circuit was allowed pursuant to Section 24(a) of the Bankruptcy Act, (11 U.S.C. Section 47(a)) (R. 112). The court below

affirmed the decision of the District Court on the authority of its prior decision in *California State Board of Equalization v. Goggin, Trustee in Bankruptcy of West Coast Cabinet, Inc.*, 191 Fed. 2d 726 which held invalid a *sales tax* imposed on a trustee in bankruptcy liquidating the assets of a bankrupt estate.

REASONS FOR GRANTING THE WRIT

A. Certiorari Should Be Granted to Eliminate the Direct Conflict in Decision Between the Ninth Circuit and the Second Circuit and to Resolve the Conflict in Principles Between the Ninth Circuit and the Eighth Circuit.

The decision of the court below in the instant case is in direct conflict with the decision of the Second Circuit Court in *City of New York v. Jersawit* (1936), 85 Fed. 2d 25 (Appendix C, *infra* page 26). In *City of New York v. Jersawit*, it was expressly held that a trustee in bankruptcy liquidating the assets of a bankrupt estate should collect from the purchasers at the liquidation sale a tax imposed on all purchasers by the City of New York and remit this tax to the city. The opinion in the *Jersawit* case was written by Judge Augustus Hand and joined in by Judges Learned Hand and H. B. Chase.

Although the court in the instant case recognized the conflict between its decision and that in the *Jersawit* case, it attempted to dismiss the latter case with the following statement:

> "It is said that such a decision would be contrary to New York v. Jersawit, 2 Cir., 85 F.2d 25, upholding a sales tax against the purchaser and requiring the trustee to withhold the amount on a liquidating sale. This opinion is not binding upon us. It has been in the books while each appeal on similar questions has been prosecuted here. There was no history of holdings of the referees and the District Courts that such a tax was in

fact a burden on the liquidating process, as there is here. The decision in that case treated the problem as one in constitutional law, fn. 11, while this Court has always viewed the matter pragmatically, although recognizing the constitutional aspects."

(Footnote 11 of the court's opinion reads as follows:

"The Court nowhere referred to 28 U.S.C.A. § 124 (a), now 28 U.S.C.A. § 960.") (Appendix B, *infra* page 15)

It is submitted that these statements by the Court of Appeals in the instant case do not successfully resolve the conflict of its decision with that of the Second Circuit in the *Jersawit* case. Initially, the prior cases decided in the Ninth Circuit Court to which the court refers in the statement quoted above involved a sales tax imposed on the trustee in bankruptcy liquidating a bankrupt estate rather than a use tax imposed on the purchaser from the trustee. In the opinion in the *Jersawit* case, the court carefully distinguished between a tax imposed directly on the trustee on the one hand and a tax imposed on the purchaser and collected by the trustee on the other. The court in the *Jersawit* case, in upholding the validity of the latter type of tax said:

"* * * A tax on a sale made by a trustee under an order of court for purposes of liquidation if payable directly and primarily by him would doubtless be a burden on a governmental instrumentality, for a judicial sale in liquidation of a bankrupt estate would in a peculiar sense involve the exercise of a federal function. Indeed, without the exercise of such a function and the power thus to dispose of assets, administration in bankruptcy would hardly be practicable. *A tax on the vendee in connection with a sale in liquidation of a bankrupt's estate is, at least in a formal sense, quite different from a tax for which the vendor is made primarily liable. Not only would the tax be on the purchaser, rather than*

the trustee, but it would be a tax equivalent to that imposed on all persons in the community similarly situated. It is the policy of the courts ordinarily to treat such general taxes as valid. The limitation of exemptions to taxes directly and substantially interfering with government functions is being adhered to with more and more strictness. Indian Territory Illuminating Oil Co. v. Board of Com'rs, 288 U.S. 325, 53 S. Ct. 388, 77 L.Ed. 812; Fox Film Corp. v. Doyal, 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010; Helvering v. Powers, 293 U. S. 214, 55 S.Ct. 171, 79 L.Ed. 291; United States Trust Co. v. Anderson (C.C.A.) 65 F. (2d) 575, 89 A.L.R. 994.

"The purchaser at the judicial sale was only required to pay the same tax he would have been bound to pay if he had purchased from anyone else. What the trustee is really complaining of is, not that a burden has been imposed upon the exercise of his functions, but of his inability to sell to a purchaser who would be exempt from a tax and because of such an exemption would pay a higher price to him than would ordinarily be paid for the goods sold. *It seems unreasonable to treat the absence of an exemption from taxes as a burden upon the normal exercise of a governmental function.*" (85 F.2d 25, at 27, Appendix C, *infra*, page 29, emphasis added.)

Although it is true, as stated in the court's opinion in the instant case, that the *Jersawit* case was on the books at the time the prior cases arising in the Ninth Circuit and involving the California sales tax were decided, it is also to be observed that the *Jersawit* case was not cited or discussed in the prior opinions of that Court of Appeals, including its opinion in *California State Board of Equalization v. Goggin, Trustee for West Coast Cabinet, Inc.*, 191 Fed. 2d 726 (which the Court of Appeals in the instant case states is controlling here) despite the fact that the *Jersawit* case

was cited and discussed in the briefs of the California State Board of Equalization in that case. It is to be observed, moreover, that when the *Jersawit* case was discussed by the District Court which heard that matter below, *sub nom In re West Coast Cabinet Works, Inc.*, 92 Fed. Supp. 636 at 648, the District Court distinguished the situation there involved from the *Jersawit* case on the ground that the *Jersawit* case involved a tax on the purchaser (such as the use tax in the instant case) whereas the litigation before it involved a sales tax imposed on the trustee. Nor does the reference by the Court of Appeals for Ninth Circuit to a history of holdings in that Circuit that a sales tax imposed directly on the trustee would be a burden on the performance of his functions in any way eliminate the direct conflict of the decision in the instant case with that in the *Jersawit* case. In the *Jersawit* case, the Court of Appeals for the Second Circuit held that a trustee in bankruptcy liquidating the assets of a bankrupt estate could be required to collect a tax imposed on the purchasers and transmit it to the city. In the instant case, the Court of Appeals for the Ninth Circuit not only held that the trustee should not collect the use tax from the purchaser but, in addition, the court held that the State of California could not proceed to collect the tax directly from the purchaser. It is thus apparent that there is a direct conflict between the decisions of the Ninth Circuit Court and the Second Circuit Court which this Court should resolve.

The decision in the instant case is, moreover, in conflict with the principles expressed by the Court of Appeals for the Eighth Circuit in *State of Missouri v. Gleick*, 135 Fed. 2d 134. The *Gleick* case involved the question of whether a trustee in bankruptcy liquidating the assets of a bankrupt estate was required to pay unemployment compensation

taxes to the State of Missouri. The Court of Appeals for the Eighth Circuit upheld the validity of the State tax on the ground that such taxation was authorized by former 28 U.S.C. 124a (now 28 U.S.C. 960) providing that a trustee in bankruptcy is subject to all Federal, State and local taxes applicable to such business to the same extent as if such business were conducted by an individual or corporation. The court in the *Gleick* case stated that under the principles expressed by this Court in *Graves v. New York ex rel O'Keefe*, 306 U.S. 466, the imposition of the tax could "by no stretch of the imagination" be held to "impose any burden whatsoever upon the United States or to limit or restrict the bankruptcy court as a department of the federal government or the trustee in bankruptcy, as an agent and officer of the court, in the discharge of the duties imposed by the Bankruptcy Act" (135 Fed. 134, 137). Thus, in the *Gleick* case, the Court of Appeals for the Eighth Circuit upheld the validity of a tax imposed directly on a trustee in bankruptcy liquidating the assets of a bankrupt estate. In the case of *In re Mid America Company*, 31 Fed. Supp. 601, the District Court for the Southern District of Illinois also upheld the imposition of unemployment insurance taxes on a trustee in bankruptcy liquidating the assets of a bankrupt estate. The *Gleick* case and the *Mid America* case are certainly contrary in principle to the holding in the instant case that even the purchaser from the liquidating trustee is immune from a tax based on the use of property which has ceased to be a part of the bankrupt estate.

The instant case is also contrary in principle to *In re Loehr*, decided by the United States District Court for the Eastern District of Wisconsin (98 Fed. Supp. 402) upholding the imposition of state and federal income taxes on a trustee in bankruptcy liquidating the assets of a bankrupt

estate based on the net income of the estate being liquidated.

It is readily apparent from the foregoing discussion that the status of a liquidating trustee with respect to state and federal taxation has arisen and will continue to arise in numerous jurisdictions throughout the country, and will be a recurring problem until resolved by this Court. It is respectfully submitted that a writ of certiorari should be issued to resolve the conflict between the federal courts in the various circuits with respect to the issue here presented.

B. This Case Involves a Question of Jurisdiction of the Federal District Court and Questions Relating to the Administration of Federal Bankruptcy and to the Application in Bankruptcy of the Taxing Statutes of the Various States.

1. THE USE TAX IS IMPOSED ON THE PURCHASER OF TANGIBLE PERSONAL PROPERTY FOR THE PRIVILEGE OF STORING OR USING SUCH PROPERTY IN CALIFORNIA.

Do the federal district courts, sitting as courts of bankruptcy, have jurisdiction to grant continuing immunity from taxation to property which has ceased to be part of a bankrupt estate? In the instant case, the Court of Appeals for the Ninth Circuit held that the State of California may be enjoined from collecting a use tax directly from a private person not a party to the bankruptcy proceeding although the use tax was based on the actual use of the property by the private party in this State. The court below did not undertake to discuss the basis on which the bankruptcy court could retain jurisdiction over property no longer part of the bankrupt estate. Instead, the court merely assumed the existence of this power without citation of any statutes or case authority in support thereof.

The sole basis for this assertion of jurisdiction to enjoin the enforcement of the State taxing law was that some nine months before the injunction was issued by the bankruptcy

court, the property had been sold by a trustee in bankruptcy liquidating assets of a bankrupt estate. It has been the position of the petitioner throughout this proceeding that the bankruptcy court was without jurisdiction to make any orders with respect to the tax liability of a private person, not a party to the bankruptcy proceeding, when such liability arose from the use of the property after it was sold by the trustee in bankruptcy and had ceased to be part of the bankrupt estate (R. 80, 88, 89, 108).

Since this case involves the application of the California use tax, it is desirable to explain briefly the nature and incidence of that tax.

The use tax is imposed pursuant to Section 6201 of the California Revenue and Taxation Code which, so far as here relevant, provides:

> "An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of three percent of the sales price of the property. * * *"

Section 6008 of the California Revenue and Taxation Code defines "storage" as "any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside of this State of tangible personal property purchased from a retailer". Section 6009 defines "use" as "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business."

It is apparent from these statutory provisions that the California use tax is imposed on the purchaser rather than on the seller and that it is the activity of the purchaser in

storing or using the property in this State after its purchase which gives rise to the liability for this tax and this Court so held in *Southern Pacific Co. v. Gallagher,* 306 U.S. 167.

The use tax is designed to complement the sales tax and to prevent discrimination against local suppliers, *Southern Pacific Co. v. Gallagher,* 306 U.S. 167, 171; *Chicago Bridge and Iron Company v. Johnson,* 19 Cal. 2d 162, 165, 119 P.2d 945, 947. It is frequently applied in situations where items are purchased in another state and brought into California to be used here, e.g., an automobile purchased in Detroit for use in this state. This Court has recognized that because of the difference in legal incidence of the sales and use tax, a use tax may be imposed under circumstances in which the imposition of the sales tax would be barred by the provisions of the federal Constitution (*General Trading Co. v. Tax Comm'n,* 322 U. S. 335; Cf. *McLeod v. Dilworth Co.,* 322 U. S. 327, 1023).

2. SINCE THE BANKRUPTCY COURT HAS NO JURISDICTION TO ENJOIN THE STATE OF CALIFORNIA FROM COLLECTING A USE TAX FROM PERSONS USING PROPERTY PURCHASED FROM A TRUSTEE IN BANKRUPTCY, THE DECISION OF THE COURT OF APPEALS UPHOLDING THE ORDER OF THE BANKRUPTCY COURT IS ERRONEOUS.

In October, 1954, the bankruptcy court permanently enjoined the State of California and the California State Board of Equalization from collecting, or attempting to collect, use tax from the Milton J. Wershow Company for exercising the privilege of using in this State the tangible personal property purchased by that Company from George T. Goggin in January of 1954 (Tr. 79). Thus, approximately nine months after certain assets ceased to be a part of the bankrupt estate, the bankruptcy court permanently enjoined the State of California from collecting a tax from a person who was not a party to a bankruptcy proceeding—a tax which resulted from activities of the purchaser wholly unrelated to the bankruptcy proceeding, namely, the pur-

chaser's storage and use of the property in California after its purchase from the trustee in bankruptcy.

An examination of the statutory provisions relating to the jurisdiction of the bankruptcy court, fails to reveal any authorization for this purported exercise of continuing jurisdiction over property no longer a part of the bankrupt estate. (In Appendix A, *infra,* page 1, the statutory provisions governing the jurisdiction of the bankruptcy court are set forth). It is so axiomatic that a bankruptcy court loses jurisdiction over property which has ceased to be a part of the bankrupt estate that an extensive discussion of the matter appears unnecessary. This principle was clearly stated in *In re Oak Park Cleaners and Dyers,* 125 F.2d 420, 422 (Seventh Circuit). See, also, *In re Krull,* 295 Fed. 520, 521 (District Court E.D. N.Y.).Yet in the instant case the referee in bankruptcy purported to exercise such jurisdiction solely because many months earlier the property had been purchased from a trustee in bankruptcy who was liquidating the assets of a bankrupt estate. This attempt by the bankruptcy court to grant immunity from taxation to property no longer under the jurisdiction of the bankruptcy court is directly contrary to the principle of law stated by this Court in *Oklahoma Tax Comm'n v. Texas Co.,* 336 U.S. 342 at 353, as follows:

> "Despite the possibility that the prospect of taxation by the state may reduce the amount the United States might receive from the sale of its property, it is well established that property purchased by a private person from the Federal Government becomes a part of the general mass of property in the state and must bear its fair share of the expenses of government."

The similarity of a use tax and a property tax was clearly pointed out in *Henneford, et al. v. Silas Mason Co. Inc., et al.,* 300 U.S. 577, at 582, where this Court said:

> "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." (Citations omitted.)

It follows that the bankruptcy court has no more jurisdiction to enjoin the collection of the California use tax from a person using assets purchased from a trustee in bankruptcy than it has to enjoin the collection of a property tax from the purchaser, the liability for which arises subsequent to the confirmation of the sale by the trustee in bankruptcy.

As the foregoing discussion has shown the bankruptcy court clearly exceeded its jurisdiction in enjoining the State of California from collecting use tax with respect to property which had ceased to be a part of the bankrupt estate. It should be noted, moreover, that the provisions of the California Sales and Use Tax Law provide a plain, speedy and adequate remedy by which the Milton J. Wershow Company may challenge the validity of the imposition of the use tax on the transaction here involved (California Revenue and Taxation Code, sections 6931, et seq.; *Corbett v. Printers & Publishers Corp.*, 127 F.2d 195 [Ninth Circuit]). Under such circumstances a federal district court is without jurisdiction to enjoin the collection of the state tax. (28 U.S.C. § 1341; *Corbett v. Printers & Publishers Corp., supra*). Moreover, the California Sales and Use Tax Law expressly prohibits the use of an injunction to restrain the collection of the taxes imposed under that law (California Revenue and Taxation Code, section 6931).

For the reasons set forth above certiorari should issue to enable this Court, in the performance of its function of supervising the federal courts, to correct this interference

with important taxing functions of this State resulting from a restraining order which is beyond the jurisdiction of the federal district courts.

C. The Effect of the Decision of the Court of Appeals in the Instant Case is to Prevent the State of California from Collecting A Use Tax from a Private Person, Not a Party to the Bankruptcy Proceeding, Based on that Person's Use of the Property in This State after It Had Ceased to be a Part of the Bankrupt Estate.

In the foregoing discussion, it has been shown that the bankruptcy court had no jurisdiction to enjoin the State of California from collecting a use tax from the Milton J. Wershow Co. because of that company's use of property which was no longer a part of the bankrupt estate. It has also been pointed out that the injunction was not proper since the Milton J. Wershow Co. had adequate remedies at law. Assuming *arguendo* that the bankruptcy court had jurisdiction, its order was nevertheless improper since, as the discussion which follows will show, the California use tax was properly applicable to the Milton J. Wershow Co. Thus the effect of the order of the bankruptcy court enjoining the State of California from withholding or attempting to collect the use tax from the Milton J. Wershow Co. is to prevent the collection of a tax which the company owes to the State under the substantive law here applicable.

Under Section 6201 of the California Revenue and Taxation Code, a purchaser is liable for the use tax if he uses in this State property purchased from a retailer for use in this State. The trustee in bankruptcy in the instant case was admittedly a retailer while he was conducting the business of the Columbia Stamping and Manufacturing Corporation and, accordingly, he reported and paid sales tax on the sales he made at such time (R. 52, 101). Under the

provisions of the California Sales and Use Tax Law a trustee in bankruptcy is expressly included in the definition of retailer (California Revenue and Taxation Code, Sections 6015(a) and 6019). There is no dispute in this case that the property here in controversy was purchased by the Milton J. Wershow Company for use in this State and that the property was used by the company in California (R. 71; California Revenue and Taxation Code, Sections 6241 [presumption that goods delivered in this State are purchased for use here]). Under the decisions of the California courts, a person who has become a retailer by virtue of conducting retail selling operations does not cease to be a retailer while he is liquidating the assets used in his business (*Market Street Railway Company v. State Board of Equalization,* 137 Cal. App. 2d 87, 290 Pac. 2d 20; *Sutter Packing Company v. California State Board of Equalization,* 139 Cal. App. 2d 889, 294 Pac. 2d 1083, hearing denied by California Supreme Court May 15, 1956). Under the California cases, therefore, George T. Goggin continued to be a retailer while he was liquidating the assets of the Columbia Stamping and Manufacturing Corporation. Since the Milton J. Wershow Company purchased tangible personal property from a retailer for use in this State and used the property here, the company was liable for the use tax under the express language of Section 6201 of the California Revenue and Taxation Code.

The Court of Appeals in the instant case, while recognizing that this might be the rule under the California cases, held that it was not bound by the interpretation of the California law by the California courts which would result in the liquidating trustee being regarded as a retailer but was free to make its own interpretation of the California statutes (Appendix B, *infra* page 18; see fn.

14 of the Court's opinion; R. 120). It is respectfully submitted that this holding of the Court of Appeals in the instant case is clearly incorrect. The State tax liability of a person not a party to a bankruptcy proceeding which resulted from the use of property which had ceased to be part of the bankrupt estate is a matter of State substantive law to be determined on the basis of the State statutes and decisions of the State courts under the rule established by this Court in *Erie R. Co. v. Tompkins,* 304 U.S. 64. Therefore, certiorari should issue in this case to require that the court below comply with the rule in the *Erie* case.

D. The Holding of the Court of Appeals for the Ninth Circuit in the Instant case that the Collection of the California Use Tax by the Trustee in Bankruptcy Would Constitute a Burden on the Performance of His Official Functions is Contrary to the Holding of This Court in Colorado National Bank v. Bedford, 310 U.S. 41.

The foregoing discussion has shown that the Milton J. Wershow Company was subject to the California use tax because of its use of tangible personal property in California. Since the use tax is imposed on the purchaser rather than the seller, the State of California could have collected the use tax directly from the Milton J. Wershow Company were it not for the order of the bankruptcy court made in excess of its jurisdiction enjoining such action. There is, however, a second and independent issue presented by this case, namely: should the trustee in bankruptcy, like other retailers maintaining a place of business in this State, be required to collect the use tax from the purchaser and transmit it to the State pursuant to the provisions of Section 6203 of the California Revenue and Taxation Code. As pointed out above, *City of New York v. Jersawit,* (Second Circuit), 85 Fed. 2d 25 (Appendix C, *infra* page 26) holds that a

trustee in bankruptcy liquidating the assets of a bankrupt estate should collect a tax imposed on purchasers and transmit it to the City of New York. The Court of Appeals in the instant case held, on the other hand, that the collection of the tax would be a prohibited burden on the performance of a federal function.

The constitutionality of the California statutory provision requiring a retailer to collect use tax from purchasers has been upheld by this Court against Commerce clause and due process objections in *Felt & Tarrant v. Gallagher*, 306 U.S. 62. The holding in the *Felt & Tarrant* case was re-affirmed by this Court in *General Trading Company v. Tax Commissioner*, 322 U.S. 335. Under the holding of this Court in *Colorado National Bank v. Bedford*, 310 U.S. 41, there are no constitutional inhibitions which would prevent the trustee in bankruptcy from collecting the use tax and transmitting it to the State of California.

In the *Colorado National Bank* case, this Court recognized that it is appropriate for a federal instrumentality to be required to collect a tax imposed on its customers even though there are constitutional inhibitions against the imposition of the tax on the instrumentality itself (*Colorado National Bank v. Bedford*, 310 U.S. 41). The *Colorado National Bank* case presented the following question: Could the State of Colorado require a national bank to collect from its customers a two percent tax measured by the bank's charges for the safe deposit service provided by the bank and to transmit the tax to the State when the State could not constitutionally impose such a tax on the bank itself. This Court, in answering this question, affirmatively stated:

> "The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of

taxes do not impose an unconstitutional burden on a federal instrumentality. * * *" (310 U.S. 41, at 53. Footnotes omitted)

The principle of *Colorado National Bank v. Bedford*, 310 U.S. 41, would clearly apply in the instant case. As the prior discussion has shown it is established by the terms of the California statute, the decisions of the California courts (*Chicago Bridge and Iron Co. v. Johnson*, 19 Cal. 2d 162, 119 P.2d 945) and the decisions of this Court (*Southern Pacific Co. v. Gallagher*, 306 U.S. 167), that the California Use Tax is imposed on the purchaser rather than the vendor. Therefore, under the principle of the *Colorado National Bank* case, *supra*, a trustee in bankruptcy, who is also a retailer maintaining a place of business in this State, may be required to collect the California Use Tax from purchasers.

The effect of the imposition of the California Use Tax in this case is merely to require the purchaser from a trustee in bankruptcy who uses the property he purchased in this State to bear the same burdens as any other person acquiring similar property for use in this State. The collection of use tax by the trustee will not interfere with the trustee's ability to dispose of the assets of the bankrupt estate since the purchaser will be required to pay the same amount of use tax regardless of whether the tax is collected from him by the trustee in bankruptcy or directly by the State of California. Since it would not interfere with the performance of his functions as a trustee in bankruptcy to collect the use tax from the purchaser and remit it to this State, the trustee in bankruptcy, George T. Goggin, should have collected use tax from the Milton J. Wershow Company on the tangible personal property which he sold that Company

for use in this State. For this reason, also, the order of the referee in bankruptcy confirmed by the District Court, and by the Court of Appeals enjoining the State of California and the State Board of Equalization from enforcing the use tax provisions of the California Sales and Use Tax Law with respect to this matter, was obviously erroneous.

CONCLUSION

For the reasons discussed above, we respectfully submit that certiorari should issue to review the decision of the Court below.

Respectfully submitted,

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(Appendices Follow)

ERRATUM

Appendix Page 28, line 26.

The sentence following the word "choice." should read as follows:

"We cannot see that the collection would have required steps on his part that would in any fair sense have interfered with the discharge of his functions."

Appendix A

I. Pertinent Provisions of the Bankruptcy Act (30 Stat. 544, as Amended by 52 Stat. 840, 60 Stat. 323, and 66 Stat. 420).

SECTION 2. *(11 U.S.C. Section 11) Creation of Courts of Bankruptcy and Their Jurisdiction.* a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions, or in any cases transferred to them pursuant to this Act;

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified; and to authorize such receiver, upon his application, to prosecute or defend any pending suit or proceed-

ing by or against a bankrupt or to commence and prosecute any suit or proceeding in behalf of the estate, before any judicial legislative, or administrative tribunal in any jurisdiction, until the petition is dismissed or the trustee is qualified: *Provided, however,* That the court shall be satisfied that such appointment or authorization is necessary to preserve the estate or to prevent loss thereto;

(4) Arraign, try, and punish persons for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in Section 48 of this Act;

(6) Bring in and substitute additional persons or parties in proceedings under this Act when necessary for the complete determination of a matter in controversy;

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property in any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse,

he shall be deemed to have consented to such jurisdiction;

(8) Close estates by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered or, if not fully administered, that the parties in interest will not furnish the indemnity necessary for the expenses of the proceeding or take the steps necessary for the administration of the estate; and reopen estates for cause shown;

(9) Confirm or reject arrangements or plans proposed under this Act, set aside confirmations of arrangements or wage-earner plans and reinstate the proceedings and cases;

(10) Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings;

(11) Determine all claims of bankrupts to their exemptions;

(12) Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

(13) Enforce obedience by persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) Extradite bankrupts from their respective districts to other districts;

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: Provided, however, That an injunction to restrain a court may be issued by the judge only;

(16) Punish persons for contempts committed before referees;

(17) Approve the appointment of trustees by creditors or appoint trustees when creditors fail so to do; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice;

(18) Tax costs and render judgments therefor against the unsuccessful party, against the successful party for cause, in part against each of the parties, and against estates, in proceedings under this Act;

(19) Transfer cases to other courts of bankruptcy;

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: Provided, however, That the jurisdiction of ancillary court over a bankrupt's property which it takes into its custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying therefrom such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction; and

(21) Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided, however,* That such delivery and accounting shall not be required, except in proceedings under Section 77 and Chapter X of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more

than four months prior to the date of bankruptcy. Upon such accounting, the court shall reexamine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive.

b. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated (52 Stat. 842 as amended by 66 Stat. 420).

SECTION 23. *(11 U.S.C. Section 46) Jurisdiction of United States and State Courts.*

a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in Sections 60, 67, and 70 of this Act (52 Stat. 854).

SECTION 24. *(11 U.S.C. Section 47) Jurisdiction of Appellate Courts.*

a. The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *And Provided, further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the United States Courts of Appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted (52 Stat. 854 as amended by 66 Stat. 423).

SECTION 38. *(11 U.S.C. Section 66) Jurisdiction of Referees.* Referees are hereby invested, subject always to a review by the judge, with jurisdiction to (1) consider all petitions referred to them and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment: (3) exercise the powers of the judge

for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or showing his sickness or inability to act; (4) grant, deny, or revoke discharges; (5) confirm or refuse to confirm arrangements or wage-earner plans, or set aside the confirmation of arrangements or wage-earner plans and reinstate the proceedings or cases; (6) perform such of the duties as are by this Act conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (7) during the examination of the bankrupt, or during other proceedings authorize the employment or stenographers for reporting and transcribing proceedings at such reasonable expense to the estate as the court may fix (52 Stat. 857).

SECTION 62. *(11 U.S.C. Section 102) Expenses of Administering Estates; Unauthorized Sharing of Fees; Withholding Allowances.*

a. (1) The actual and necessary costs and expenses incurred by officers, other than referees, in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred (52 Stat. 872 as amended by 60 Stat. 329).

II. Title 28 U.S.C. (Judiciary and Judicial Procedure) Sections 959, 960, 1341 and 2281.

SECTION 959. *Trustees and receivers suable; management; State laws.*

a. Trustees, receivers or managers of any property, in-

cluding debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

b. A trustee, receiver or manager appointed in any cause pending in any court of the United States including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated; in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

SECTION 960. *Tax liability.*

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

SECTION 1341. *Taxes by States.*

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

SECTION 2281. *Injunction against enforcement of State statute; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting

under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

III. Pertinent Provision of The California Sales and Use Tax Law (Section 6001 et seq. of the California Revenue and Taxation Code, 1952 edition).

SECTION 6001. *This part is known and may be cited as the "Sales and Use Tax Law."*

SECTION 6005. "Person" includes any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, assignee for the benefit of creditor, trustee, trustee in bankruptcy, syndicate, the United States, this State, any county, city and county, municipality, district, or other political subdivision of the State, or any other group or combination acting as a unit.

SECTION 6008. "Storage" includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this State of tangible personal property purchased from a retailer.

SECTION 6009. "Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business.

SECTION 6014. "Seller" includes every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax.

SECTION 6015. "Retailer" includes:

(a) Every seller who makes any retail sale or sales of

tangible personal property, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others.

SECTION 6019. Every individual, firm, copartnership, joint venture, trust, business trust, syndicate, association or corporation making more than two retail sales of tangible personal property during any 12-month period, including sales made in the capacity of assignee for the benefit of creditors, or receiver or trustee in bankruptcy, shall be considered a retailer within the provisions of this part in his or its individual, firm, copartnership, joint venture, trust, syndicate, associate or corporate capacity.

SECTION 6201. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of 3 percent of the sale price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter.

SECTION 6202. Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer maintaining a place of business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer maintaining a place of business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

SECTION 6203. Every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use or other consumption in this State, not exempted under Chapter 4 of this part shall, at the time of making the sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

SECTION 6204. The tax required to be collected by the retailer constitutes a debt owed by the retailer to this State.

SECTION 6241. For the purpose of the proper administration of this part and to prevent evasion of the use tax and the duty to collect the use tax, it shall be presumed that tangible personal property sold by any person for delivery in this State is sold for storage, use, or other consumption in this State until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

SECTION 6931. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this part of any tax or any amount of tax required to be collected.

Appendix B

I.

OPINION OF COURT OF APPEALS

United States Court of Appeals
For the Ninth Circuit

No. 14,917—Jan. 14, 1957

California State Board of Equalization,
Appellant,

vs.

George T. Goggin, Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt,
Appellee.

Upon Appeal from the United States District Court for the Southern District of California, Central Division

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Before: Lemmon, Fee and Barnes, Circuit Judges

James Alger Fee, Circuit Judge:

The State Board of Equalization was restrained from collecting from George T. Goggin, as Trustee in Bankruptcy, or from a purchaser from him, any tax or debt based upon a sale of tangible personal property, sold in liquidation of the estate. The Referee held that the imposition was a burden upon the process of officers liquidating an estate in bankruptcy. The District Judge adopted and amended the findings of the Referee and confirmed the order of restraint.

This Court has many times dealt with like questions at the insistence of the state authorities.[1] The last time the

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1. See California State Board of Equalization vs. Goggin, 9 Cir., 191 F.2d 726, cert. den., 342 U.S. 909, 27 A.L.R.2d 1211; State

problem came up in this Court,[2] the taxing statute was in the exact terms which it now contains,[3] as was the congressional law permitting officers of the bankruptcy court to pay taxes to the state for acts done in the conduct of the business.[4] We then held that a state tax upon a sale of tangible property under an order of the bankruptcy court directing liquidation was a levy upon the process of a court of the United States and a burden upon its officers in an essential judicial function. This was based upon findings of fact made in that case by the Referee and affirmed by the District Judge.[5]

Essentially, as applied to a liquidation sale in bankruptcy, this tax constitutes a burden on the process of liquidation. Whether the phrasing of the law imposes a liability directly upon the Trustee to pay a sales tax or indirectly places the burden upon the Trustee by naming the imposition a use tax, which the purchaser at a liquidating sale must pay, the net effect is identical.

The rationale of the opinions in the most recent decisions of this Court on this power is that any impost upon the essential liquidation process of the bankruptcy court is void.[6] This has been the consistent policy and holding of

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Board of Equalization vs. Boteler, 9 Cir., 131 F.2d 386; Ingels vs. Boteler, 9 Cir., 100 F.2d 915, affirmed, Boteler vs. Ingels, 308 U.S. 57. Cf. California State Board of Equalization vs. Goggin, 9 Cir., 183 F.2d 489.

2. This was in 1951, in California State Board of Equalization vs. Goggin, 9 Cir., 191 F.2d 726, cert. den., 342 U.S. 909, 27 A.L.R. 2d 1211.

3. See Cal. Stat. (Revenue and Taxation Code) (West, 1956) § 6051, sales tax; § 6201, use tax.

4. 28 U.S.C.A. § 960.

5. California State Board of Equalization vs. Goggin, 9 Cir., 191 F.2d 726, cert. den., 342 U.S. 909, 27 A.L.R.2d 1211.

6. California State Board of Equalization vs. Goggin, supra, Note 5.

this court.[7] Fact findings of the referees and the trial courts that such a tax was a burden have been consistently affirmed. This Court should respect and follow our previous opinions. The trial courts are entitled to reply upon such earlier pronouncements. It may be objected that, in the last case before us, this clause relating to a use tax imposed upon the purchaser was not directly passed upon. As pointed out above, the situation was identical, and those opinions ruled broadly that no burden could be placed on a liquidating sale in bankruptcy. Here the Board is really presenting another argument which might have been made in the previous case. In practice, if the sales tax were levied upon the Trustee, he would necessarily have passed the tax on to the purchaser. The same result is attained by taxing the purchaser and requiring the Trustee to collect[8] or collecting the impost from the purchaser.[9] All these devices are proscribed as to liquidating sales in bankruptcy.

Whatever the protean forms of a statute may be, or whatever subtle ingenuity of legislative tax advisors may suggest now or in the future, the tax is in fact based upon the sale; the sale is for the essential purpose of liquidating; the liquidation process was burdened thereby. The paramount authority in the bankruptcy field can be limited only by Congress. But, since Congress has already designated

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7. See cases cited in Note 1.

8. See Cal. Stat. (Revenue and Taxation Code) (West, 1956) § 6203, which imposes upon a "retailer" who is "making sales" the duty to collect the use tax, when due, from the purchaser, and § 6204, which provides that the "tax required to be collected by the retailer constitutes a debt owed by the retailer to this State."

9. See Cal. Stat. (Revenue and Taxation Code) (West, 1956) § 6202, which imposes primary liability on the buyer for payment of the use tax on "tangible personal property purchased from a retailer" unless the seller has previously given the buyer a receipt therefor.

sales in the course of operation of a business as the sole area where the state is permitted to impose a tax of any type,[10] essential sales in liquidation are inevitably free from such imposition.

It is said that such a decision would be contrary to New York vs. Jersawit, 2 Cir., 85 F.2d 25, upholding a sales tax against the purchaser and requiring the trustee to withhold the amount on a liquidating sale. This opinion is not binding upon us. It has been in the books while each appeal on similar questions has been prosecuted here. There was no history of holdings of the referees and the District Courts that such a tax was in fact a burden on the liquidating process, as there is here. The decision in that case treated the problem as one in constitutional law,[11] while this Court has always viewed the matter pragmatically, although recognizing the constitutional aspects.

The former opinions of this Court drew an exact distinction between sales "in the conduct of any business" and sales in the liquidation of the bankrupt estate pursuant to court order.[12] Such a distinction is sound and well founded. It would be unquestionably conceded that, if the bankruptcy court had ordered a sale in liquidation of this same property immediately after Goggin qualified as a Trustee and the same property had then been sold, there would have been no tax thereon due from anyone, whether called "sales tax," "use tax" or "excise tax" under the selfsame statutes of the state.

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10. 28 U.S.C.A. § 960.

11. The court nowhere referred to 28 U.S.C.A. § 124(a), now 28 U.S.C.A. § 960.

12. Compare Ingels vs. Boteler, 9 Cir., 100 F.2d 915, affirmed sub. nom., Boteler vs. Ingels, 308 U.S. 57, with State Board of Equalization vs. Boteler, 9 Cir., 131 F.2d 386.

Now the cardinal purpose of the acts relating to bankruptcies is to liquidate the property of the debtor in order to accomplish equitable distribution of his assets to his creditors. Any act which hinders, delays or burdens the accomplishment of this vital purpose constitutes an unlawful interference with the process of the court of bankruptcy and is invalid. Here there is an express finding that these particular sales were pursuant to a court order directing liquidation. The tax in question was declared invalid because it burdened this essential process.

However, at the risk of cumulative iteration, the matter will be re-examined. The power of Congress to pass uniform laws in relation to bankruptcies is paramount and supreme under the Federal Constitution. The federal courts, empowered by such legislation in bankruptcy, have never attempted arbitrarily to set off property in possession of their officers as sacrosanct and thus immunized from state taxation. Permission to levy general taxes upon property in possession of trustees in bankruptcy has never been denied. Congress passed a specific statute relative to a trustee engaging in business in order to conform to the burdens borne by other members of particular business communities. This enactment reads:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." 28 U.S.C.A. § 960.

The Trustee in this case has paid sales or use taxes to the state during the period in which he operated the business of the Columbia Stamping and Manufacturing Corporation for seven years under this statute. But the agents of the state are not satisfied, but desire to foster conflict between

state and federal authorities. We admonished them in our former opinion that this is an unwise course of procedure. We said:

> "It would be unwise to foster conflict where Congress has manifested a desire for harmony. Any such conflict would necessarily entail an application of the fundamental doctrine that laws enacted pursuant to power delegated to the United States under the Constitution are the supreme law of the land, and state laws inconsistent therewith are to that extent invalid. McCulloch v. Maryland, 1819, 4 Wheat 316, 17 U.S. 316, 4 L.Ed. 579. Our conclusion, however, adheres not only to our former view, State Board of Equalization v. Boteler, supra, but also to the doctrine that where problems in the sphere of dual sovereignty are involved, legislation should receive a construction which permits both to function with a minimum of interference each with the other. Metcalf & Eddy v. Mitchell, 1926, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384." California State Board of Equalization vs. Goggin, 9 Cir., 191 F.2d 726, 730, cert. den., 342 U.S. 909, 27 A.L.R.2d 1211.

The trial court treated this opinion as a precedent binding upon it in the instant case. For the reasons set out above, this conclusion is affirmed. The facts in the present case are parallel to those in the previous decision. The Board is really arguing a different theory of the incidence of the tax. Now they say they are pursuing Goggin personally because he failed as Trustee in Bankruptcy to collect the amount due to the state from the purchaser and, failing that, they may collect from the purchaser.

This argument, as well as all others relating to taxes arising from liquidation sales, is really concluded by the previous case. It could have been raised there on parallel facts between the same parties. If it is not res adjudicata, the doctrine of stare decisis might well control our action.

There is considerable sophistry in the definition whereby the Trustee and the purchaser are claimed to be liable for any tax on such a transaction, as was pointed out in our previous opinion. Neither the Trustee nor the purchaser would be liable upon a liquidation sale alone.

> "The tax measure involved is imposed upon all 'retailers.' A 'retailer' is defined as, inter alia, every *person* engaged in the business of making sales at retail of tangible personal property. In 1945, some years after the decision in State Board of Equalization v. Boteler, supra, Section 6005, which defines those included within the meaning of the word 'person', as used in the act, was amended and the words 'trustee' and 'United States' were added. It is contended that these changes impose the tax upon liquidation sales made by a trustee in bankruptcy through the operation of former Section 124a of Title 28." California State Board of Equalization vs. Goggin, 9 Cir. 191 F2d 726, 729, cert. den., 342 U.S. 909, 27 A.L.R. 2d 1211.[13]

In other words, if the Trustee had never carried on the business and made retail sales, no one could be taxed on a liquidation sale, whatever the impost was called. A court of bankruptcy cannot be controlled by the declaration that a person engaged in making retail sales becomes a 'retailer' and thereby purchasers from him become liable to pay and he to collect this tax on liquidation sales not only on his stock of goods but upon sales of his furniture, fixtures and equipment. The fact that the state may hold this statute reasonable as to its citizens does not change the nature of

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13. Since this case was argued, an additional definition of "retailer" has been added. Cal. Stat. (Revenue and Taxation Code) (West, 1956) § 6019, Stats. 1951, c. 870, p. 2389, § 1.5. It seems to add little, however, as it depends on the making of "retail sales." Similarly, § 6005 has been amended, Stats. 1951, c. 870, p. 2389, § 1, to include "trustee in bankruptcy."

a sale pursuant to an order of liquidation of a bankruptcy court into an ordinary sale in the conduct of business.[14] The power of Congress is paramount. And the distinction between sales "in the course of business" and "in liquidation" is real and patent.

Affirmed.

(Endorsed:) Opinion. Filed Jan. 14, 1957.

Paul P. O'Brien, Clerk.

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14. In a case such as the instant one, this Court is not bound by the state construction of the California tax. That construction is, as the Supreme Court said in Richfield Oil Corporation vs. State Board, 329 U.S. 69, 84, "not determinative of the question of whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect." Compare Market Street Railway Co. vs. California State Board of Equalization, 137 California App. 2d 87, 99, and Sutter Packing Co. vs. State Board of Equalization, 139 California App. 2d 889, 893, where the view is expressed that the state courts are not bound by federal holdings in the matter of interpretation of state tax provisions.

II.

JUDGMENT OF COURT OF APPEALS

United States Court of Appeals
for the Ninth Circuit

No. 14,917

California State Board of Equalization,
Appellant,

vs.

George T. Goggin, Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment Filed and Entered: January 14, 1957 Paul P. O'Brien, Clerk.

III.

OPINION OF DISTRICT COURT

In the District Court of the United States, Southern District of California, Central Division.

In the Matter of
Columbia Stamping and Manufacturing Corporation, Bankrupt No. 44,605-BH.
Neu-Bart Stamping & Mfg. Co., Bankrupt No. 44606-BH.

MEMORANDUM OPINION

In this review of two similar orders made by the late Referee in Bankruptcy, Hugh L. Dickson, entered on October 22, 1954, in the above two companion cases, the court is faced with the recurring problem of the State Board of Equalization of the State of California, in its persistent efforts to interfere and interject itself into the affairs of the Bankruptcy Court. This time the vehicle is the "sales and use tax law" of the State of California as amended in 1951. This amendment was an obvious attempt to overcome the ruling in California State Board of Equalization v. Goggin, 191 F.2d 726, and in Re Davis Standard Bread, 46 F. Supp. 41, and affirmed in 131 F.2d 386.

It is my view that it makes no difference whether you call it a "sales tax" or a "use tax" or any other name that may be applied. The nomenclature is immaterial, the effect is the same.

I feel this case is controlled by State Board of Equalization v. Goggin, 191 F.2d 726, and I am bound by the rulings of our Circuit Court, notwithstanding an apparent contrary ruling in the case of City of New York v. Jersawit, CCA, 2, 85 F.2d 25.

The court adopts the findings of fact and conclusions of law made by referees in each case and the orders under review are affirmed. The trustee is directed to prepare and submit proper order for my signature.

Dated: This 19th day of May, 1955.

/s/ Ben Harrison, Judge

IV.

ORDER OF DISTRICT COURT

In the District Court of the United States Southern District of California Central Division in Bankruptcy No. 44605-BH

In the Matter of:
Columbia Stamping and Manufacturing Corporation,
Bankrupt.

ORDER

The state Board of Equalization of the State of California having filed its petition for review of that certain order dated October 22, 1954, made by the Honorable Hugh L. Dickson, Referee in Bankruptcy, and said matter having duly come on for hearing on April 4, 1955, Frank C. Weller and Russell B. Seymour, by Russell B. Seymour, appearing on behalf of George T. Goggin, Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, bankrupt; and Edmund G. Brown, Attorney General of the State of California, and Edward Sumner, Deputy Attorney General, by Edward Sumner, appearing on behalf of the petitioner; and briefs having been presented by the respective parties and the matter submitted to the Court for its further orders; Now, Therefore, the Court makes, confirms and

adopts each and every of the Findings of Fact contained in said order of the Referee and in addition, pursuant to stipulation of counsel makes the following additional Finding of Fact, to wit:

> That the personal property involved in the instant review had been used by the respondent Trustee in Bankruptcy for a period of approximately seven (7) years immediately preceding January 5, 1954, first as receiver and then as Trustee of the bankrupt estate in the course of the operation of the business of the bankrupt and during said period in operating the business made numerous sales of tangible personal property at retail, in respect to which, however, all applicable taxes were paid by the respondent to the said State Board of Equalization.

and the Court makes, confirms and adopts each and all of the Conclusions of Law set forth in said order; and based thereon, hereby makes the following order:

It Is Ordered that the said petition for review be and hereby is denied and that the said order of the referee be and hereby is confirmed, ratified and approved.

Dated: This 20th day of June, 1955.

/s/ BEN HARRISON,
Judge of the District Court of the United States.

Affidavit of service by mail attached.

[Endorsed]: Filed June 27, 1955. Judgment docketed and entered June 27, 1955.

V.

ORDER OF REFEREE IN BANKRUPTCY

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 44,605-BH

In the Matter of Columbia Stamping and Manufacturing Corporation, a corporation, Bankrupt.

(Findings of Fact and Conclusions of Law Are Omitted—These Appear at R. 69)

ORDER

It Is Ordered, Adjudged and Decreed:

I.

That the State of California, the California Board of Equalization, and the respective officers, agents and employees of each, and each of them, be and hereby are permanently restrained and enjoined from collecting, or attempting to collect, from George T. Goggin, either as Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt, or individually, or from Milton J. Wershow Company, a co-partnership consisting of Milton J. Wershow and Gladys R. Wershow, any tax or debt of whatsoever nature arising from or based upon any of the provisions of the Sales and Use Tax Law of the State of California, insofar as same relates to the tangible personal property included in a sale orally confirmed in this Court January 5, 1954 and confirmed in writing on or about January 13, 1954.

II.

The said Milton J. Wershow Company, a copartnership composed of Milton J. Wershow and Gladys R. Wershow, be and hereby is permanently restrained and enjoined from collecting, or attempting to collect, from George T. Goggin, either as Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt, or individually, any tax or debt, or reimbursement for any payment thereof, of whatsoever nature, arising from or based upon any of the provisions of the Sales and Use Tax Law of the State of California, insofar as same related to the tangible personal property included in said sale orally confirmed in this Court January 5, 1954 and confirmed in writing on or about January 13, 1954.

III.

That the objection to jurisdiction filed herein by the State of California and the California Board of Equalization be and hereby is overruled and denied.

Dated: This 22nd day of October, 1954.

HUGH L. DICKSON
Referee in Bankruptcy

Received October 16, 1954.
[Endorsed]: Filed October 22, 1954, Referee.

Appendix C

CONFLICTING DECISION

In re Leavy et al. City of New York v. Jersawit, No. 415. (85 F.2d 25) Circuit Court of Appeals, Second Circuit, July 13, 1936.

"Appeal from the District Court of the United States for the Southern District of New York.

Proceeding in the matter of Thomas Leavy and Michael Bruckschlagl, individually and as copartners doing business under the firm name and style of Service Hardware Company, bankrupts, wherein Louis Jersawit was appointed trustee. From an order dismissing a petition by the City of New York to review the order of a referee in bankruptcy rejecting the claim of the city for the payment of taxes under section 8 of Local Law No. 24 for the year 1934 (Loc. Laws 1934, p. 170, No. 25), the City of New York appeals.

Reversed.

Paul Windels, Corp. Counsel, of New York City (Paxton Blair, Meyer Bernstein, and Sol Charles Levine, all of New York City, of counsel), for claimant-appellant.

Samuel Sturtz, of New York City, for trustee-appellee.

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges.

Augustus N. Hand, Circuit Judge.

The trustee in bankruptcy of Service Hardware Company sold at public auction through the United States auctioneer stock and fixtures of the bankrupts and received $2,643.56 from the purchasers. The City of New York demanded payment from the trustee of $52.87, being 2 per cent. of the amount he received out of the auction sale and in addition $8.70 as a penalty and interest. This claim having been presented to the bankruptcy court was rejected by the referee, whose decision was affirmed by the District Judge. From

the order which dismissed the reviewing petition the present appeal was taken. We think the matter was not properly decided in the court below.

The rejection of the item of $8.70 by the court is not questioned, but the city insists that the claim as to $52.87 should have been allowed because the imposition of the sales tax and a payment of the amount of it out of the bankrupt's estate in no way would impede the government of the United States in the performance of its functions.

The sale was held on January 28, 1935. Under Local Law No. 24 of the Municipal Assembly of the City of New York (Loc. Laws 1934, p. 166, No. 25, § 2), a tax of 2 per cent. was imposed on 'tangible personal property sold at retail.' A 'retail sale' is defined in the act page 165, No. 25, § 1(g) as a sale to any person for any purpose other than for resale in the form of tangible personal property. It is not questioned that the auction sale in this case was a retail sale within the meaning of the act.

While the amount claimed was based upon a percentage of the proceeds of a sale made by a trustee in bankruptcy in liquidation of an insolvent estate, pursuant to order of the bankruptcy court, we think the imposition upon the trustee of a duty to collect that amount from the purchaser at the auction cannot be regarded as unlawfully burdening an instrumentality of the government.

In the case of In re Flatbush Gum Co., 73 F.(2d) 283, 284, we had before us the question whether a sale by a receiver in bankruptcy in liquidation of an insolvent estate was taxable under the New York State Tax Law (Consol. Laws, c. 60). We held the state act inapplicable because it contained no language clearly embracing such a sale by a receiver. But in chapter 394 of the Laws of 1935 the State Tax Law (section 390(a)) was so amended as to define the

word 'person' as including 'an executor, administrator, receiver, trustee or other fiduciary.' Had the act contained that definition, when the case of In re Flatbush Gum Co., was before us, we could hardly have avoided answering what we there characterized as 'the rather baffling question of what is, or what is not, the imposition of a state tax upon an instrumentality of the government of the United States.'

By the Municipal Law, which we must construe in the present case, 'person' is defined in section 1(a) as including a 'receiver, trustee or any other person acting in a fiduciary capacity.' Loc. Laws 1934, p. 165, No. 25. But under that law the sales tax is not imposed upon the vendor (here the trustee), for, according to Section 2 thereof, it is to 'be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.' The trustee in the case at bar neglected to collect the tax from the purchaser, perhaps in order to test the validity of the Municipal Sales Tax when applied to situations like the present. In any event, the fact that he only collected the purchase price and did not require the purchaser to pay the tax was a matter of his personal choice. We cannot see that the collection would have required steps on his part that the collection would have required steps on his part charge of his functions. It can hardly be imagined that a tax on goods purchased from the army or navy or any other government department would be regarded as an unlawful impediment to the exercise of a government function. Yet there, as here, if the goods were to be tax free in the hands

of the purchaser, the seller would have been likely to get a better price than if they were to be subject to a tax. Indeed, an exemption would probably result in a gain by vendors in their receipts from sales that would be measured by the amount of taxes that purchasers would ordinarily have to pay. If taxes on purchases at ordinary government sales are not unlawful, it is hard to see why taxes on purchases at judicial sales should stand in a different category. It must be remembered that property in the hands of a trustee is ordinarily subject to the same state and municipal taxes to which other property in the locality is subject, (Swarts v. Hammer) 194 U.S. 441, 24 S.Ct. 695, 48 L.Ed. 1060, and that trustees and receivers, if continuing the business of insolvent corporations, are liable for corporate franchise taxes. Michigan v. Michigan Trust Co., 286 U.S. 334, 52 S.Ct. 512, 76 L.Ed. 1136. A tax on a sale made by a trustee under an order of court for purposes of liquidation if payable directly and primarily by him would doubtless be a burden on a governmental instrumentality, for a judicial sale in liquidation of a bankrupt estate would in a peculiar sense involve the exercise of a federal function. Indeed, without the exercise of such a function and the power thus to dispose of assets, administration in bankruptcy would hardly be practicable. A tax on the vendee in connection with a sale in liquidation of a bankrupt's estate is, at least in a formal sense, quite different from a tax for which the vendor is made primarily liable. Not only would the tax be on the purchaser, rather than the trustee, but it would be a tax equivalent to that imposed on all persons in the community similarly situated. It is the policy of the courts ordinarily to treat such general taxes as valid. The limitation of exemptions to taxes directly and substantially interfering with government functions is being adhered to with

more and more strictness. Indian Territory Illuminating Oil Co. v. Board of Com'rs, 288 U.S. 325, 53 S.Ct. 388, 77 L.Ed. 812; Fox Film Corp. v. Doyal, 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010; Helvering v. Powers, 293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291; United States Trust Co. v. Anderson (C.C.A.) 65 F.(2d) 575, 89 A.L.R. 994.

The purchaser at the judicial sale was only required to pay the same tax he would have been bound to pay if he had purchased from anyone else. What the trustee is really complaining of is, not that a burden has been imposed upon the exercise of his functions, but of his inability to sell to a purchaser who would be exempt from a tax and because of such an exemption would pay a higher price to him than would ordinarily be paid for the goods sold. It seems unreasonable to treat the absence of an exemption from taxes as a burden upon the normal exercise of a governmental function.

The order appealed from is reversed, with costs to the city of New York, its claim is allowed and it is entitled to preferential payment out of the assets in the hands of the trustee because it arose through a sale of merchandise conducted by the trustee or on his behalf."

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IN THE

Supreme Court of the United States

October Term, 1956
No. 875

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

vs.

GEORGE T. GOGGIN, Trustee of the Estate of Columbia Stamping and Manufacturing Corporation, Bankrupt,
Respondent.

Respondent's Brief in Opposition to a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The respondent, George T. Goggin, Trustee in the Estate of Columbia Stamping and Manufacturing Corporation, files his Brief in Opposition to the granting of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 14, 1957.

Preliminary Statement.

Before discussing the several points urged by the petitioner, the respondent points out that the petitioner has failed to quote all of the pertinent provisions of the California Sales and Use Tax laws, which, had they been

set forth, would result in a denial of a writ of certiorari. The respondent adds Sections 6006.5(a), 6242, 6244, 6351, 6352, 6367 and 6402* (Resp. App. A, *infra*, pp. 1, 2).

It is pointed out that "Chapter 4 of this part" mentioned in Section 6203 (Pet. App. A, III, p. 11) includes Sections 6351 to 6421 and contains a lengthy list of exemptions from sales and use taxes, some of which (Secs. 6351, 6352, 6367 and 6402) the respondent has added in Appendix A, p. 2, *infra*.

Additional facts are set out in Statement of the Case.

Questions Presented.

The original proceeding was not tried before the Referee in Bankruptcy on the theory merely that injunctive relief should be granted against the State of California from collecting the Use Tax from the purchaser only; but also on the theory that injunctive relief be granted against the purchaser from suing the Trustee in Bankruptcy for any amount the State might collect from the purchaser; and, in turn, to do full equity, the court restrained the State from pursuing either the Trustee or the purchaser, thereby completing the circle (Order of Referee, Pet. App. B, V, p. 24).

In light of the Statement of Facts, as hereafter supplemented by the respondent and of the additional provisions of the Sales and Use Tax law supplied by the respondent (Resp. App. A, pp. 1, 2). Question 1 should be stated as follows:

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*Unless otherwise noted in respondent's brief all section numbers refer to California Sales and Use Tax Law (Secs. 6001, *et seq.* of California Revenue and Taxation Code, 1952 edition).

(a) Did the bankruptcy court have jurisdiction *to determine* controversies involving the State, the Trustee in Bankruptcy and a purchaser based on asserted Use Tax obligations arising from a liquidation sale by the bankruptcy court?

(b) If so, did the bankruptcy court correctly decide that no Use Tax (or debt) arose because of a liquidation sale by the bankruptcy court?

(c) If the bankruptcy court correctly decided that no Use Tax (or debt) arose, did it have power to restrain the State from effecting collection thereof from either the Trustee or the purchaser.

Question 2, as stated by the petitioner, assumes the validity of a Use Tax (or debt) arising from a liquidation sale by the bankruptcy court and is dependent upon a negative answer to Question 1(b).

Question 3, as stated by petitioner, assumes that the Court of Appeals for the Ninth Circuit disregarded the decisions of the California Appellate Courts and did substantiate its own contrary interpretation of the State's statutes.

Statutes Involved.

The respondent has added certain provisions of the California Revenue and Taxation Code, which were omitted by the petitioner, being Sections 6006.5(a), 6242, 6244, 6351, 6352, 6367 and 6402 (Resp. App. A, pp. 1, 2).

Statement of the Case.

The petitioner has omitted several important facts, which, had they been set forth, would result in a denial of a writ of certiorari.

The purchaser, Milton J. Wershow Company, was a party to the petition of the Trustee [R. 59, 62, 70]; took part in the hearing [R. 70, 77]; and, threatened to sue the trustee for such amount as it, the purchaser, might be required to pay to the State because of any Use Tax [R. 77].

The order of the Referee not only enjoined the State from proceeding against either the Trustee or the purchaser [R. 79; and Pet. App. B, p. 24] but also enjoined the purchaser from proceeding against the Trustee [R. 80; and Pet. App. B, p. 25].

In its answer [R. 66, Par. VI] the State admitted that no sales tax could be imposed upon the Trustee in Bankruptcy in connection with the liquidation sale by the Trustee and that the State was not seeking to impose or collect from the Trustee or anyone else, any amount of sales tax in connection with the liquidation sale.

Nevertheless in Paragraph VII [R. 66-67],[1] the State contended that it had the right to impose a Use Tax upon a purchaser from a "retailer" (the trustee) who was not subject to the sales tax; and in Paragraph VIII [R. 67][1] asserted that it was the duty of the trustee to collect the Use Tax from the purchaser and remit it to the State;[2] and that it was the right and duty of the State to proceed with the collection of such tax, from not only the purchaser, but also the trustee [R. 67-68].

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[1]The last line of Par. VIII [R. 67] should precede line 1 [R. 67].

[2]Under Section 6204, the obligation of the seller is called a "debt".

The Referee found that the State was making such contentions and that the State (in the absence of injunction) would proceed to effect collection of the tax from the purchaser and the trustee [R. 75-77]; that the purchaser was threatening to collect from the trustee such sum as the purchaser might be required to pay the State [R. 77, Par. IX]; and that the statements of the State and of the purchaser rendered it impossible to close the (bankrupt) estate [R. 77, Pars. 8 and 9].

Summary of Argument.

A. THE NINTH CIRCUIT AND THE SECOND CIRCUIT ARE IN ACCORD THAT NO "SALES" TAX MAY BE LEVIED ON A LIQUIDATION SALE.

THE CALIFORNIA STATUTES INTERNALLY PROVIDE FOR EXEMPTION FROM "USE" TAX OF CERTAIN TYPES OF SALES WHICH WOULD INCLUDE A LIQUIDATION SALE.

B. A "USE" TAX IS AN ADMINISTRATIVE EXPENSE, THE EFFECT OF WHICH SHOULD PROPERLY BE ADJUDICATED BY THE BANKRUPTCY COURT TO PROVIDE STABILITY TO BANKRUPTCY SALES.

C. THE NINTH CIRCUIT HAS NOT FAILED TO FOLLOW ERIE R. CO. VS. TOMPKINS.

D. A TRUSTEE SHOULD NOT BE REQUIRED TO COLLECT THE "USE" TAX IF LIQUIDATION SALES ARE NOT SUBJECT TO SALES OR USE TAX.

Reasons for Denying the Writ.

A. Certiorari Should Be Denied Because There Is No Real Conflict in the Decisions of the Ninth Circuit and the Second Circuit.

At no point does the petitioner contend that it has the right to assess a "sales" tax on a liquidation sale by a Trustee in Bankruptcy. The *Jersawit* case (*State of New York v. Jersawit*, 85 F. 2d 25, Pet. App. C, p. 26) is in full accord with the Ninth Circuit that such a tax would be a burden on a *governmental instrumentality* and indicates that a Trustee in Bankruptcy is an instrumentality of the United States. Both circuits are in complete agreement that a liquidation sale by a Trustee in Bankruptcy is a federal function exercised by a governmental instrumentality and that a tax imposed on such a sale would be a burden on a governmental instrumentality. The apparent fundamental variance in the two cases seems based on the proposition of whether a Trustee in Bankruptcy, having previously operated a business, may be required to collect a "use" tax from a purchaser from the Trustee at a liquidation sale and transmit such "use" tax to the local taxing agency. The *Jersawit* case found that the "use"[3] tax was an obligation of the purchaser only and that the duty cast upon the Trustee to collect the tax from the purchaser was not a burden upon a governmental instrumentality.

In the pending case, the Ninth Circuit, after pointing out that a "sales" tax on a liquidation sale would be a levy upon the process of the court and a burden upon its officers in an essential judicial function, held that a "use" tax was the equivalent of a "sales" tax.

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[3]Designated a "sales" tax in the *Jersawit* case.

This is supported by language in *The Atchison, Topeka & Santa Fe Railway Company v. State Board of Equalization,* 139 Cal. App. 2d 411, 294 P. 2d 181, where the Court with approval quotes Justice Traynor's *article in* 24 *Cal. L. Rev.* 175, 176:

> "It is the intent of the Use Tax merely to supplement the Sales Tax by imposing upon those subject to it a tax burden equivalent to that of the Sales Tax with the same specific exemptions in each case."

The State, it would appear, has acquiesced in the proposition that no "sales" tax can be levied against a Trustee in connection with a liquidation sale by the bankrupt court [R. 66, Par. VI]. *California State Board of Equalization v. George T. Goggin,* 191 F. 2d 726, 730, cert. den. 342 U. S. 909, 27 A. L. R. 2d 1211; *State of New York v. Jersawit,* 85 F. 2d 25 (Pet. App. C, p. 26 at p. 29).

The California Sales and Use Tax law within itself provides a basis for sustaining the instant decision and denying a writ of certiorari. Section 6402 (Resp. App. A, p. 2) provides that no "use" tax shall be imposed on property purchased from any instrumentality of the United States (with exceptions not involved). Section 6006.5 (Resp. App. A, p. 1) provides that property not held or used by a seller in the course of activity in which he is not required to hold a seller's permit, is an "occasional" sale. Section 6367 (Resp. App. A, p. 2) grants an exemption to "occasional" sales of both "sales" and "use" taxes. Section 6352 (Resp. App. A, p. 2), provides that if the State be prohibited from taxing the sale of certain personal property by reason of the constitution or laws of the United States, then it shall not collect a "use" tax.

None of such provisions appeared in the opinion in the *Jersawit* case.

Such provisions appear geared to the holding in the instant case: that if no sales tax may be levied against a trustee in connection with a liquidation sale, then no "use" tax shall be imposed.

The State of Missouri v. Gleick, 135 F. 2d 134 (p. 9 of Petition) might be distinguishable on ground that the applicable taxes had, in effect, originated through congressional action.

B. The Bankruptcy Court Had Jurisdiction to Determine Whether Any Liability or Duty Under the Use Tax Existed on Part of the Trustee in Bankruptcy, Arising From the Sale and Liquidation, and Whether Any Injunctive Relief Should Be Granted.

The bankruptcy court had the jurisdiction (right) to determine whether any claim existed against the trustee by reason of the liquidation sale. Such claim would be an expense of Administration under Section 62a of the Bankruptcy Act, 11 U. S. C. 102 (Pet. App. A, p. 7). (*McColgan v. Maier Brewing Co.* (9th Cir.), 134 F. 2d 385.) The bankruptcy court had a right to protect its own officers in the discharge of their duties laid down by Congress. (*Oklahoma v. Texas,* 266 U. S. 298, 45 S. Ct. 101, 69 L. Ed. 296, *Id.,* 268 U. S. 472, 45 S. Ct. 609, 69 L. Ed. 1057; *California State Board of Equalization v. Goggin,* 195 F. 2d 726, cert. den. by S. Ct. in 342 U. S. 909, 96 L. Ed. 680, 72 S. Ct. 302.)

Where it is impossible to administer completely the estate of the bankrupt without determining a controversy between third parties, a bankruptcy court has jurisdiction

to determine a dispute between third parties. (*Reconstruction Finance Corp. v. Riverside State Bank*, 217 F. 2d 455; *Central States v. Luther*, 215 F. 2d 38.)

In order for a trustee to hold a proper liquidation sale, he should be able to state to any prospective bidder, whether he, the trustee, was required to collect a "use" tax and if so, the amount thereof should be added to the sales price and collected from the purchaser; or the trustee should advise a prospective purchaser that no "use" tax would be collected or assessed.

Before any such statement can properly be made, the trustee should have a legal determination that a "use" tax would or would not flow from a liquidation sale.

If the bankruptcy court would make its ruling that no "use" tax was proper, the trustee would so advise prospective bidders and would not collect any tax from the purchaser; however, the State, in the absence of injunction, would then proceed against the purchaser; and the purchaser, in turn, would seek relief against the trustee for any sums collected from the purchaser by the State. Thus, in order to provide stability to a bankruptcy sale, it is necessary that the bankruptcy determine the full responsibility and liability of the State, the trustee and the purchaser and grant any appropriate injunctive relief to protect its own order.

C. The Ninth Circuit Has Not Failed to Follow the State Law, or Erie R. v. Tompkins, 304 U. S. 64.

The essence of the petitioner's argument under C, page 16 of the Petition, is based on the assumption that the State Courts have already determined that a Trustee in Bankruptcy, *liquidating assets after having conducted a business* is to be taxed as a "retailer." The cited cases,

Market Street Ry. Co. v. State Board of Equalization, 130 Cal. App. 2d 87, 290 P. 2d 20, and *Sutter Packing Co. v. California Board of Equalization,* 139 Cal. App. 2d 889, 294 P. 2d 1083 made no such holding. They merely stated that a private citizen of the State of California did not occupy the same position as a Trustee in Bankruptcy while liquidating an estate. The cited cases *might* be applicable if the trustee, while liquidating, were subject to the provisions of 28 U. S. C. 960.

Thus, there is no failure by the courts to follow the principles of *Erie R. Co. v. Tompkins,* 304 U. S. 64.

The Second Circuit in *Austrian v. Williams* (1954), 216 F. 2d 278, clearly points out that the mere attempt to collect and liquidate the debtor's assets does not constitute carrying on the debtor's business in any proper sense of the term.

Thus, in the instant case, Section 960 of 28 U. S. C. A. no longer applied after the bankruptcy court made its order that the assets be liquidated, at which time the State of California no longer had any authority to apply its interpretation of what "business" taxes might be levied against the assets of a liquidating estate. The State proposes to extend the effect of Section 960 to mean that if a trustee *ever operated* a business, he is forever bound by State statutes and State court interpretations even while the trustee is liquidating the assets.

In the instant opinion of the Ninth Circuit (Pet. App. B, p. 19, fn. 14) it was pointed out that the Supreme Court in *Richfield Oil Corp. v. State Board,* 329 U. S. 69, 84, had stated that a State court cannot so construe a State statute as to deprive a taxpayer of a federal right. Neither can the State of California insist that its definition of "in the course of business" or "liquidation" affects

the definition attached by high federal courts inasmuch as that definition applies to purely federal matters, such as a definition of liquidation sales in bankruptcy proceedings, or a construction of Title 28 U. S. C. 960 (Pet. App. A. p. 8).

D. The Collection of the Use Tax by a Trustee Would Be a Burden on Bankruptcy Administration.

If a trustee, while liquidating assets, is subject to "use" tax obligations, possibly he should be required to collect such tax. However, in addition to any physical burdens imposed, there are certain features of the Sales and Use Tax Law, Sections 6242 and 6244 (Resp. App. A, p. 1) which might hold open bankrupt estates for undetermined periods. According to the cited sections, no "use" tax is to be collected from a trustee holding a seller's permit, if the property is purchased for resale; but if, at any time in the future, the purchaser should "use" the property, the seller (the trustee in bankruptcy) would become liable for collection and payment of the "use" tax.

The petitioner's entire argument however, is based on the assumption that a "use" tax can properly be levied, which assumption the respondent has earlier controverted.

Conclusion.

The respondent respectfully urges that the Petition for Writ of Certiorari be denied.

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